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No. 02-817

IN THE

Supreme Court of the United States

STEAM PRESS HOLDINGS, INC., DBA YOUNG LAUNDRY AND DRY CLEANING, AND MICHAEL DRACE,
Petitioners,

v.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, AS AN INDIVIDUAL, DOE DEFENDANTS 1-150,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent, Hawaii Teamsters and Allied Workers, Local 996, hereby discloses that it is not a corporation. As such, the Union has no affiliates, parents or subsidiaries that have publicly issued shares.

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Respondents Hawaii Teamsters and Allied Workers, Local 996 and Mel Kahele respectfully request the petition for writ of certiorari sought in this matter be denied.

INTRODUCTION

Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union Local 996, 302 F.3d 998 (9th Cir. 2002), is not a controversial opinion. Its central holding echoes a well established rule of defamation law that this Court and the courts of the Ninth Circuit have followed for years: In order for challenged speech to be actionable, it must be reasonably susceptible to a defamatory interpretation. This maxim

applies with particular force when the speech in question occurs in the course of a labor dispute: As this Court stated in *Letter Carriers v. Austin*, 418 U.S. 264, 283-4, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), "The sine qua non of recovery for defamation in a labor dispute . . . is the existence of falsehood." And as this Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), before a court can reach the test for knowing or reckless falsehood, it must have determined that the statement in question is false and defamatory. Even *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966)—the precedent on which petitioners purport to pin their hopes—is in complete accord on this point: "[Plaintiff] must show that he was injured by the circulation of the statements; *this necessarily includes proof that the words had a defamatory meaning*." *Id.* at 58, fn. 2 (emphasis added).

The Ninth Circuit resolved this cases on the basis of its determination that the statements "Mike is making money," "Mike Drace is making money from the Steam Press," and "Mike is hiding money in the Steam Press" are not defamatory.

The court reached this determination after carefully applying the test that has been employed in the Ninth Circuit and in most other jurisdictions for decades to resolve the question of defamatory meaning, to wit: the "totality of the circumstances test." This test was presaged by this Court's decision in *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 9, 110 S.Ct. 2695, 111 L.Ed.2d (1990), and subsequently refined in a long line of cases including *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (cert. denied 499 U.S. 961, 111 S.Ct. 1586, 113 L.Ed.2d 650 (1991)), *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), and *Dodds v. Am. Broad. Co.*, 145 F.3d 1053 (9th Cir. 1998).

The Ninth Circuit Court began its application of the "totality of the circumstances" test in this case by examining the challenged statements in their broad context, considering, *inter alia*, their general tenor, subject matter, setting and format. The court's analysis did not stop there. It then proceeded to evaluate the specific words in question with an eye for any figurative or hyperbolic language that might affect a listener's understanding. Finally, it applied the prong of the test which this Court emphasized in *Milkovich*: the evaluation of the statements' verifiability, *i.e.*, their susceptibility to being proven true or false. *See Hawaii Teamsters*, 302 F.3d at 1006; *Milkovich*, 497 U.S. at 19.

Each prong of the court's analysis was well reasoned, thoughtfully circumscribed, and informed by long-standing precedent. The court broke no new ground when it penned this opinion. But this would come as a surprise to any stranger to the case who reads Steam Press's petition for certiorari for the first time. There, Steam Press characterizes the Ninth Circuit's holding as an "arbitrary," "speculative" decision that eviscerates this Court's decision in *Linn*, contravenes *Milkovich* and "creates" an "absolute privilege" for defamatory statements made in the labor context. None of these charges are remotely born out by the language of the Ninth Circuit's opinion and all depend on unduly selective—indeed tortured—readings of the controlling authorities.

In this brief, respondent Hawaii Teamsters will demonstrate that each of the four grounds on which Steam Press seeks certiorari lacks merit. Specifically, the Union will show that:

1. The Ninth Circuit's opinion neither "conflicts with" nor "seeks to nullify" *Linn*. To the contrary: On the very limited legal point that the two cases have in common (*i.e.*, the requirement that the challenged statements in a state defamation action brought in the context of a labor dispute must be defamatory to give rise to liability), they are entirely

in accord. Further, Steam Press's insinuation that this case somehow signals the death knell of state defamation liability in the labor sphere is pure histrionics. The Ninth Circuit did no more than find several innocuous statements to be non-defamatory under a particular set of facts. It made no sweeping pronouncements on the general viability of defamation actions that are spawned by labor disputes and did not foreclose state defamation remedies when challenged speech meets the threshold requirement of being defamatory.

2. The Ninth Circuit's opinion is not inconsistent with *Milkovich*. In this regard, Steam Press's contention that *Milkovich* "set a non-contextual standard" for determining the defamatory meaning issue is belied by the reasoning of the *Milkovich* court. In explaining the constitutional underpinnings of the fact/non-fact dichotomy, the *Milkovich* Court embraced decisions such as *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), *Letter Carriers*, 418 U.S. 264, and *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), all of which relied heavily upon the context of the challenged speech in resolving the defamatory meaning question. Moreover, in this case, the Ninth Circuit placed great weight on the verifiability component of the defamatory meaning analysis and thereby focused on precisely the factor emphasized in *Milkovich*.

3. The Ninth Circuit's opinion does not conflict with any extant decision on federal labor policy for the simple reason that it is not based—and does not purport to be based—on such policy. It is a decision based solely on defamation law.

4. The Ninth Circuit's opinion does not "create an absolute privilege" for defamatory speech in the context of a labor dispute. It merely states that challenged statements uttered in the course of a labor dispute—like challenged statements in any other context—must be defamatory to be actionable. The opinion does not suggest that statements

made in a collective bargaining or strike setting can never be defamatory. It does not even hint that, henceforth, the judicial parsing of statements made in such settings will be more rigorous than or otherwise different from that employed heretofore in cases like *Letter Carriers*. No new privilege is spoken of—much less created.

In sum, the instant opinion does not conflict with the opinion of any court cited by petitioners. The opinion has no implications for (and does not involve the interpretation of) federal labor statutes because it is based solely on defamation law. There is no intimation that the court departed in any way from accepted judicial procedures. There is no basis for the grant of certiorari in this case.

FACTS OF THE UNDERLYING CASE

In September of 1998, and for many years before, Young Laundry and Dry Cleaning, Inc. ("YLDC") was a retail dry cleaning business that employed approximately 70-80 workers. [ER 107, ¶ 1.] YLDC was a unionized establishment. Its employees were represented by the Hawaii Teamsters and Allied Workers, Local 996 (the "Union"). In 1998, the Union's president was Kahele. Kahele had held this position for only two short years. [ER 108, ¶¶ 6,7.]

YLDC's employees were, by and large, middle aged to elderly, female and relatively unskilled. [ER 17:11-16.] Many of them were not proficient in English. In fact, the Union could only communicate with its members by using a translator who spoke Ilocano and Tagalog, as well as English. [ER 18:2-5; ER 19:4-8.] A significant number of these women had worked for YLDC for decades.

In September, 1994, YLDC's former manager, Michael Drace ("Drace"), offered to purchase YLDC from its owners on condition that the Union agree to numerous concessions on employee wages and benefits. [ER 108, ¶ 4; ER 110, ¶ 15; *Hawaii Teamsters*, 302 F.3d at 1001.] Drace had known

many of the employees for years. He approached them personally and persuaded them that concessions were necessary if the business was to survive. He promised that the healthcare, sick leave, paid vacation time and other benefits that he was asking them to give up would be restored after four years. Although the precise words of Drace's promise are not in evidence, it is clear that the employees understood the concessions as a "*loan*" that would be repaid. [ER 20:1-6; ER 21:4-6; ER 20-25; ER 22:11-22.] Ultimately, the Union agreed to the concessions YLDC was sold to Drace on September 30, 1994.

From September of 1994 until the summer of 1998, YLDC's employees served their employer loyally and without complaint—notwithstanding the sacrifice of benefits and wage increases that Drace had insisted upon. Drace maintained a cheerful and upbeat demeanor, and the employees had no reason to believe that the business was not doing well. [ER 23:20-24:8.] From the employees' perspective, YLDC showed signs of prospering. It expanded its operations by purchasing seven dry cleaning stores from the Al Phillips chain. [ER 25:6-9; ER 26:3-4; ER 27:10-25.] It acquired a number of new delivery trucks and spent a significant sum to refurbish existing stores and vehicles. [ER 28:3-4; ER 24-25; ER 29:1-15.]

On July 13, 1998, shortly before the expiration of the four-year period during which the concessions were to be in effect, the Union notified YLDC that it wished to reopen negotiations of its agreement with the company. [ER 113, ¶ 23; *Hawaii Teamsters*, 302 F.3d at 1002.] The Union had been in close contact with the employees [ER 30:18-25] and understood that their goal was "to get back what they had lent the company about four years ago, the holiday that was lent, the sick leave, and the other thing[] that they lent to the company to help." [ER 20:1-6.]

One week later, Drace responded with a letter written on behalf of YLDC. Drace's letter stated that YLDC was in financial trouble. He maintained that YLDC could not compete with non-unionized dry cleaners and proposed that the employees' benefits be cut further. [ER 114, ¶¶ 27-28; *Hawaii Teamsters*, 302 F.3d at 1002.] Drace offered to make YLDC's books and records available for the Union's inspection. *Hawaii Teamsters*, 302 F.3d at 1002.

From this letter and YLDC's further communications with the Union, the employees knew that Drace was not only breaking his promise to restore their benefits but was proposing to make further reductions. From their perspective, their four years of sacrifice had been met with betrayal; they had been duped.

The Union was aware that, in past labor negotiations, Drace's predecessor had pled poverty and then had ultimately made concessions. It therefore understood Drace's response as a bargaining strategy. [ER 31:13-25; ER 32:3-10; ER 33:1-15.] Instead of responding directly to Drace's proposal, the Union decided to conduct its own investigation into YLDC's finances and, to this end, asked the International Brotherhood of Teamsters to provide it with information. *Hawaii Teamsters*, 302 F.3d at 1002. At the same time, it organized a negotiating committee from the ranks of YLDC's employees. [ER 115, ¶¶ 30-31.]

On August 24, 1998, before the parties' first bargaining session, YLDC sent its second proposal to the Union. This proposal was even worse than the first one from the Union's perspective: in addition to benefit concessions, it sought a 5% wage concession. Again, the asserted justification for the proposed terms was YLDC's poor financial health. [ER 115, ¶¶ 32-33.]

On September 2, 1998, Union representatives met with Drace and others to discuss YLDC's proposals. In the course

of this meeting, Drace presented numerous charts and graphs that purported to portray YLDC's financial condition. [ER 117, ¶¶ 37-39; *Hawaii Teamsters*, 302 F.3d at 1002.] He advised the Union that the substantial concessions he proposed were required if YLDC was to survive. The Union representatives remained skeptical and told Drace that charts can be "made to show anything that [one] wants them to show." [ER 34:1; *Hawaii Teamsters*, 302 F.3d at 1002.] In response to Drace's demands, the Union proposed the restoration of the benefits that had been conceded in 1994 together with wage increases for each of the following three years. *Hawaii Teamsters*, 302 F.3d at 1002. Kahele advised Drace that the employees would not accept YLDC's earlier proposal. Drace rejected the Union's proposal out of hand. [ER 118, ¶¶ 41-42.]

On September 10, 1998, another negotiating session was convened. At that session, YLDC presented its third proposal which was similar, in all material respects, to the second proposal. *Hawaii Teamsters*, 302 F.3d at 1002. The Union rejected it. During this meeting, the Union representatives inquired about a company whose existence they had discovered just one day earlier and whose name was unfamiliar to them. The company was Steam Press Holdings, Inc. ("Steam Press"). When the Union representatives asked about the relationship between Steam Press and YLDC, Drace told them that Steam Press was a holding company "**set up to invest the *profits* of YLDC.**" [ER 123, ¶ 61; ER 35:3-16; *Hawaii Teamsters*, 302 F.3d at 1002.] When this statement provoked further questions, Drace fell silent and his counsel, Jared Jossem, insisted that all further questions about Steam Press be submitted to the company in writing. [ER 36:11-14.] Jossem then escalated the tension in the room by demanding to know whether the Union representatives were calling Drace "a liar." [*Hawaii Teamsters*, 302 F.3d at 1002.] Union representative Torres responded "we can," and representative Kahele added "We will," thereby manifesting

his deep mistrust of Drace and YLDC. [ER 37:17-38:17; ER 60:1-6; ER 39:3-5; *Hawaii Teamsters*, 302 F.3d at 1002.]

On September 8, 1998, the Union received a Dun & Bradstreet Report (hereinafter the "D&B Report") and supporting documents that contained information about Enevil, Inc., d/b/a Young Laundry and Dry Cleaning. Kahele examined the Report and noticed that YLDC's sales were $7,000,000 per year. [ER 40:1-4.] The D&B Report's supporting documents showed that YLDC had recently agreed to acquire seven laundry drop-off locations from the Al Philips chain. From these indicators, Kahele inferred that YLDC was profitable. That Kahele misinterpreted the D&B Report is not disputed. However, the record is devoid of evidence that his belief in YLDC's financial stability was anything but genuine.

On September 11, 1998, Kahele addressed a meeting of Union members who had gathered to discuss the Union's negotiations. According to the testimony of one member who attended the meeting, Kahele stated that "Mike is making money" and "Mike Drace is making money from the Steam Press." [ER 135, ¶ 120; *Hawaii Teamsters*, 302 F.3d at 1002.][1]

Throughout the course of the parties' negotiations, Drace had made certain that YLDC's employees were familiar with the company's side of the story. He posted YLDC's proposals on the company bulletin board and notified them of the parties' bargaining sessions. [ER 41:11-22.] Drace explained YLDC's precarious financial condition to the employees and even offered to split with them any "profits" that they could

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[1] The District Court found that Kahele also said that Drace "is hiding money in Steam Press." It based this finding on the testimony of Hannah Kilakalua. However, the witness did not testify that Kahele spoke the words "Mike is hiding money" or any similar words. [ER 46:24-25; ER 47:9-16.]

locate. [ER 42:18-25.] At all times, the employees were fully informed as to the parties' respective positions.

On September 17, 1998, a third negotiating session took place. Again Drace offered YLDC's books and tax returns to the Union for inspection. The Union declined the invitation. [ER 126, ¶ 72.]

As the negotiations proceeded, the Union representatives heard the same refrain from the employees again and again: "What is so unreasonable about what we're asking? All we asking is what we lend the company." [ER 43:1-15.] The employees clearly expressed their lack of sympathy for YLDC's financial plight, saying: ". . . *How could the [company] have a hard time when they could buy seven Al Phillips stores, they buy new trucks, they buy new equipment?*" [ER 43:24-44:4.] They were determined that their benefits be restored—regardless of YLDC's condition. They repeatedly warned the Union representatives that, if their demands were not met they would strike, and if the representatives refused to advance this agenda, they would oust them. [ER 43:3-15; ER 44:13-25; ER 45:8-20.] In response to the mood of its members, the Union sought approval of strike benefits from the Teamsters Joint Council 42. [AF, ¶ 74.]

On September 25, 1998, the Union agreed to have its accountant examine YLDC's books. Kahele accompanied Union accountant Terry Takaki to YLDC's offices where they were presented with the consolidated books and records of YLDC and Steam Press. [ER 48:14-49:20; *Hawaii Teamsters*, 302 F.3d at 1002-3.] After reviewing these materials, Takaki informed Kahele that YLDC had no money. [*Hawaii Teamsters*, 302 F.3d at 1003.] Kahele knew that the members would not be responsive to the Union's explanations of YLDC's financial problems. [ER 50:17-19.]

The employees' strike authorization vote took place on September 29, 1998. By this time, the employees had determined that they would strike. [*Hawaii Teamsters*, 302 F.3d at 1003.] Union representative Jose Bob Bruno tried to explain the possible adverse consequences of a strike. He also advanced YLDC's argument that it could not afford to meet the Union's demands. [ER 51:10 to ER 43:1-25 to ER 44:1-25 to ER 52:1-9.] The members responded that they were striking of their "own free will" and would "replace" the Union representatives if they failed to support this decision. These vehement attitudes were expressed *before* Kahele arrived at the strike authorization meeting. [ER 52:1-11.] At some point before the vote took place, the name Steam Press was mentioned. The District Court found that, among other things, "Kahele and others" mentioned that "Drace is making money from Steam Press." [ER 125, ¶ 69; *Hawaii Teamsters*, 302 F.3d at 1003.] At this meeting, the employees voted 80-8 in favor of a strike.

Despite this overwhelming majority vote, the Union deferred economic action and returned to the bargaining table hoping to use the strike authorization as leverage. On October 2, 1998, the parties met again with the federal mediator, but no significant progress was made. [ER 129, ¶ 91.]

On October 5, 1998, Drace unilaterally implemented his "last, best and final offer." The concessions he proposed at the outset of negotiations were forced upon the bargaining unit. [ER 129, ¶ 91.] Even then, no strike was called. Instead, the Union agreed to attend another meeting with Drace on October 6, 1998, during which Drace quipped that the employees could be placated if Kahele would tell them that *"ninety-five percent of their pay is better than zero percent."* [ER 130, ¶ 92.] Not surprisingly, the parties declared an impasse. [ER 131, ¶ 95.]

The next day, Kahele returned to the bargaining unit and informed the members of what had transpired since the first strike authorization vote. He wanted to be certain that their collective will was to strike. Kahele then called for a final vote. The members voted with their feet. All who wanted to strike were directed to move to one side of the room, while those opposed were instructed to remain where they were. Everyone present moved to the "strike side" of the room. [ER 52:10-53:13.] The following day, the YLDC employees struck. [ER 131, ¶ 97.]

I. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN LINN

The issue upon which the instant case turned was that of defamatory meaning. The specific question addressed by the Ninth Circuit was whether, under the established legal criteria, the challenged statements could reasonably be interpreted as defamatory statements of fact. By ruling that the statements in question were not defamatory, the court effectively precluded defamation liability. Because its ruling on the defamatory meaning issue was case-determinative, the court deemed it unnecessary to adjudicate the remaining issues raised in the Union's appeal, to wit: the "of and concerning" doctrine and the constitutional malice question. *Hawaii Teamsters*, 302 F.2d at 1009, fn. 6. Since the court's opinion did not discuss—much less adjudicate—either of those issues, it cannot be deemed to diverge from established precedent on either issue.

By contrast, the central issue in *Linn v. United Plant Guards Workers*, was that of federal preemption. The *Linn* court framed the issue as follows: "The case before us presents the question whether, and to what extent, the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §141 *et seq.* (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an

employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers." *Linn*, 383 U.S. at 55. In that case, the Court concluded that state defamation remedies are available to a plaintiff involved in labor disputes *if* s/he pleads and proves that the defamatory statements were published with constitutional malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Linn*, 383 U.S. at 55.

At no point in the opinion does the *Linn* court undertake a defamatory meaning evaluation of the challenged statements before it. Nor does it appear from the text of the opinion that any defendant raised a defamatory meaning challenge at any point in the proceedings. However, the *Linn* court does acknowledge that, even in the context of a labor dispute, the plaintiff "must show" that the challenged "words had a defamatory meaning." *Linn*, 383 U.S. at 58, fn.2.

Because the *Linn* court never discussed—much less ruled on—the defamatory meaning issue, it is simply ludicrous to suggest that *Hawaii Teamsters*—which arises *solely* from the court's resolution of the defamatory meaning issue and does not touch upon labor policy, federal preemption or even constitutional malice—is in conflict with *Linn*. Yes, both cases involve defamation actions brought by management as a result of words published during a labor dispute, but each deals with distinct, non-overlapping legal issues. And, notwithstanding Steam Press's protests to the contrary, *Hawaii Teamsters* does *not* hold that defamation plaintiffs who were participants in a labor dispute can never avail themselves of their state remedies. Nor does it hold that the fact that the challenged speech arises in a labor setting automatically renders it non-defamatory. It simply states—and rightly so—that the labor dispute context is a factor in the defamatory meaning analysis.

Not only does *Hawaii Teamsters* not conflict with *Linn*, but it harmonizes with that decision in an important respect. The *Linn* court recognized that the labor relations context must be taken into account in evaluating all aspects of a defamation case that arises in the course of a dispute between labor and management. Indeed, although it did not attempt to resolve any specific defamatory meaning issue, the *Linn* court went out of its way to note that "Labor disputes are ordinarily heated affairs; *the language that is commonplace there might well be deemed actionable per se in some state jurisdictions*. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Linn*, 383 U.S. at 58, quoting *Cafeteria Employees Union, etc. v. Angelos*, 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943) (emphasis added).

As this Court observed in *Letter Carriers*, *Linn* recognized that federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. *Letter Carriers v. Austin*, 418 U.S. at 283. The point is that if the *Linn* court *had* undertaken a defamatory meaning analysis, it undoubtedly would have proceeded along a course similar to that followed by the Ninth Circuit here.

One final point must be made. In its petition, Steam Press correctly cites *Linn* for the proposition that, when "constitutional malice" is pled and proved, plaintiffs who might otherwise be limited to the non-remunerative remedies of the NLRA may seek redress under state defamation law. Steam Press then commits a logical fallacy. It loudly insists that, because the statements at issue in this case were made with constitutional malice, Steam Press must be entitled to its state defamation remedies. The flaws in this reasoning are obvious: First of all, the *Linn* court never held that

defamation liability is automatic wherever reckless disregard for truth is pled and proved. Rather, it expressly held that plaintiff must first, as a prerequisite to liability, prove defamatory meaning. That is, *Linn* agrees that the existence of constitutional malice only gives rise to defamation remedies if the challenged statement is first found to be defamatory. Malice in the absence of a defamatory statement is not enough. Conversely, the Ninth Circuit's ruling in this case was not based on the absence of constitutional malice but on the lack of defamatory meaning. It certainly did not rule that defamatory statements uttered with constitutional malice never give rise to liability in a labor context. On the contrary: it cited *Linn* for its holding that defamatory statements made with constitutional malice are actionable in state court even when made in the context of a labor dispute.

It is important to recognize that the resolution of the defamatory meaning question necessarily precedes the resolution of the constitutional malice question. This is because no statement—not even one spoken with reckless disregard for truth—can give rise to defamation liability unless it is defamatory. As the court stated in *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1367 (1993), "[f]alsity and defamatory meaning are analytically separate. A statement may be false, and a publisher may act with reckless disregard as to truth or falsity. However, if the statement is not defamatory, no liability may attach." This Court took effectively the same position in *Gertz v. Welch* when it held that the test for constitutional malice cannot be reached unless the statement at issue is defamatory. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-340.

In essence, Steam Press proposes that this Court somehow conflate the logically distinct analyses of defamatory meaning and constitutional malice and hold, contrary to all precedent, that the defamatory meaning analysis should hinge—not on a reasonable listener's interpretation of the challenged

speech—but on the speaker's subjective state of mind as to its truth. This reasoning is spurious and utterly lacking in support. It must be rejected.

In sum, the *Linn* and *Hawaii Teamsters* decisions deal with distinct and non-overlapping legal issues. They do not conflict in any way.

II. THE NINTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH MILKOVICH

As Steam Press would have it, the Supreme Court in *Milkovich* prescribed a mechanistic one-factor test that must be applied without deviation each time the defamatory meaning issue arises. The test, according to Steam Press, is whether the statement is "sufficiently capable of being proven true or false." Petition, p.17. The *Hawaii Teamsters* decision runs afoul of *Milkovich*, Steam Press argues, by employing a "totality of the circumstances test" that involves careful consideration of the context in which the challenged speech occurs. Steam Press take the position that, under *Milkovich*, the "context" of the challenged speech may not be considered as part of the defamatory meaning analysis.

The first point that must be made in response to this argument is that its premise is demonstrably incorrect. At no time in its history has the Supreme Court advocated a simplistic "one-step" formula for determining whether challenged speech is deserving of Constitutional protection. Indeed, this Court has traditionally shown great sensitivity to the context in which a statement is made and has routinely examined the surrounding circumstances to determine whether they affect the manner in which the language might reasonably be construed.

Cases in point include *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 at 13-14 (in which the Court placed great weight upon the fact that the allegedly defamatory statements were made in the context of a heated public controversy and

thus could be viewed as no more than "vigorous epithet"), *Letter Carriers*, 418 U.S. at 283-85 (in which the Court deemed the challenged speech non-actionable in large part because it was published in the context of a bitter labor dispute),[2] and *Hustler Magazine v. Falwell*, 485 U.S. 46 (in which the High Court considered the fact that the challenged speech appeared in cartoon format in the pages of a notoriously irreverent, not to say risqué, men's magazine, and determined that, when viewed in context, the speech could not reasonably be interpreted as defamatory of plaintiff). It cannot be overemphasized that *Milkovich* does not represent a break with this tradition. Rather, *Milkovich* embraces this approach by citing these cases at length and with approval: "Next, the *Bressler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Steam Press's premise is in error for a more specific reason: The defamatory meaning analysis employed by the *Milkovich* court was hardly mono-dimensional. Instead of simply determining whether the words "Milkovich . . . lied" were capable of being proved false, the High Court evaluated

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[2] It is noteworthy that the *Letter Carriers* court anticipated exactly the argument that defendants make here, *i.e.*, that if the judiciary routinely considers the context of speech that occurs during a labor dispute, it will always deem the speech non-actionable. In response, the High Court stated: "This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact . . . But in the context of this case, no such factual representation could reasonably be inferred . . ." *Letter Carriers*, 418 U.S. at 286.

those words in the context of the article as a whole, considered the author's diction and took note of the circumstances surrounding publication. For example, the Court noted that the "general tenor" of the challenged publication (an article about statements given under oath at a public hearing) did not negate the impression that the author was literally accusing Milkovich of perjury. *Milkovich*, 497 U.S. at 21. The Court also examined the words themselves to determine whether the use of "figurative" or "hyperbolic language" would negate the impression that the writer was asserting a statement of objective fact. *Id.* The Court even considered the audience toward which the publication was directed, going out of its way to note that the 42,065 citizens of Maple Heights, the city in which the reported incident occurred, would not "view statements such as these differently from people in a large city." *Milkovich*, 497 U.S. at 22. Thus, although the *Milkovich* Court emphasized the verifiability factor, it did not rely solely on that factor in reaching its conclusion that the challenged speech was actionable. Moreover, it certainly did not proscribe other courts from applying a multi-factor test that includes the verifiability component.

When we examine the Ninth Circuit's opinion in this case, it is immediately evident that the verifiability component was given careful consideration and considerable weight. (*See Hawaii Teamsters*, 302 F.3d 998.) Citing *Underwager v. Channel 9 Australia*, 69 F.3d at 366, the court stated: "[W]e must determine whether the statements at issue are provable as true or false." *Hawaii Teamsters*, 302 F.3d at 1008. The court then squarely addressed Steam Press's argument that "[the fact that] YLDC was not making money was proven true by [the Union's] own accountant, and Kahele knew it." *Id.* The court responded to this argument by pointing out that it assumed that the challenged statements were sufficiently unambiguous to be capable of a verifiable meaning. The court rejected that assumption holding that the challenged

statements were phrased in "abstract language" capable of any number of meanings. "Kahele's statements do not rest on a 'core of objective evidence,' *Underwager*, 69 F.3d at 367, and are simply not susceptible of being proved true or false. Thus, this factor, like the previous two, weighs in favor of construing Kahele's statements as opinion rather than fact." *Hawaii Teamsters*, 302 F.3d at 1009.

From the foregoing, it is clear that, even if the court had used only the verifiability factor in resolving the defamatory meaning question,[3] it would have reached the same conclusion: Kahele's statements were not defamatory. In light of the Ninth Circuit's attention to the verifiability component, Steam Press's assertion that the court reached its defamatory meaning conclusion on the sole basis of the statements' labor dispute context is a manifest distortion of the court's opinion.

Ironically, Steam Press's contention that the Ninth Circuit erred in considering the context of the challenged speech spells automatic defeat for its own position on the defamatory meaning issue. Interpreted in isolation, the words "Mike Drace is making money from the Steam Press" and even the words "Mike is hiding money in the Steam Press" do not have any tendency to injure the subject's reputation. The ability to "make money" from one's business is an admirable trait. And the act of hiding money cannot, in the absence of some nefarious circumstance, be construed as illegal, immoral, or otherwise objectionable behavior. If the challenged phrases can be said to be disparaging at all, they can only be so in context. When construed in the context of tense labor/management relations in which labor has asked that its benefits be restored and management has refused on the grounds that it has no money, the statements arguably cast

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[3] Here, the Union reemphasizes that the court was not obliged to employ such a test.

a hazy pall of suspicion over Mike Drace. But without the information provided by the context, the challenged speech is not even mildly insulting—much less defamatory. Simply put, if context is not a component of defamatory meaning, Steam Press's defamation claim would not have survived the pleading stage.

Before leaving the defamatory meaning issue, one more point must be made. Supreme Court cases like *New York Times v. Sullivan*, *Letter Carriers* and *Milkovich*—whose objective is to define the constitutional limits on the type of speech that may be subject to defamation actions—establish a baseline for first amendment protection. In other words, no statement may be deemed actionable defamation if it does not meet the threshold requirements set forth in these cases. However, states remain free to employ more stringent First Amendment protections for speech if they deem fit. *Mills v. Rogers*, 457 U.S. 291, 300, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982) (recognizing that "the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). Thus, even if Steam Press were correct in saying that the *Milkovich* court resolved the defamatory meaning question with a one factor test, the states and the federal circuits could nevertheless employ more complex tests that are more protective of speech, provided that they also meet the baseline requirement established in *Milkovich*. The "totality of the circumstances" test would (if Steam Press's interpretation of *Milkovich* were correct) be exactly such a test. It incorporates the verifiability component of *Milkovich* but also includes additional factors that make for a subtler analysis and greater protection for speech.

III. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE LAWS OF ANY CIRCUIT ON MATTERS OF LABOR POLICY

Steam Press endeavors to manufacture a "conflict" between the *Hawaii Teamsters* opinion and other federal opinions (in the 6th Circuit and elsewhere) by falsely stating that the opinion holds that "dishonesty 'enjoys the full protection of federal labor law.'" Petition at 21. It goes on to argue, desperately, that the opinion will undermine the very fabric of labor relations. Petition at 22-24. These arguments are little more than bombast. The most casual reading of the opinion reveals that the Ninth Circuit did not hold that all speech uttered in the labor arena is absolutely privileged. It simply held, reasonably, that non-defamatory speech in the labor context (like non-defamatory speech in any context) cannot give rise to defamation liability. The court never intimated that "the important social policies which underlie the law of defamation" are to be disregarded when defamatory speech occurs in the context of a labor dispute. It merely implied that the social policies underlying defamation law don't come into play if there is no defamation. Nothing in the opinion mandates—or even hints at—a change in mechanics of labor relations. No aspect of the opinion frustrates any aspect of "Federal Labor Policy," whether it be "union members' rights to meaningful participation in union affairs" or the union's "duty of fair representation." (See Petition at 21-23.) Federal labor policy was not even discussed in the defamation portion of the opinion. All that the opinion stands for as far as labor relations are concerned is that "Freedom of speech is an essential component of the labor management relationship. . . . federal law gives a union license to use intemperate abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Hawaii Teamsters,* 302 F.3d at 1009. In making this pronouncement, the Ninth Circuit was not proposing the adoption of a radical

new principle of labor law but quoting from this court's landmark decision in *Letter Carriers*, 418 U.S. at 283.

Steam Press goes on to argue that the *Hawaii Teamsters* opinion conflicts with the Illinois Court of Appeal's decision in *Lowe Excavating Co. v. Int'l Union of Operating Engineers Local No. 150*, 765 N.E. 2d 21 (Ill. App. Ct. 2002). Nothing could be further from the truth. Preliminarily, it should be noted that the lions' share of the *Lowe* opinion was devoted to an analysis of the constitutional malice issue—an issue that the Ninth Circuit expressly declined to reach in the instant case. However, to the extent that the *Lowe* court addressed the issue of defamatory meaning, its approach was congruous with the method employed by the court in this case—particularly with respect to its reliance on context to determine defamatory meaning.

The *Lowe* court began its defamatory meaning analysis by distinguishing between defamation per se and defamation per quod, and determining that the challenged speech did not qualify as the former: "Here, the harmful nature of the Union's statements was not obvious but required knowledge of an extrinsic fact, that is, that the Ballashire Hall project was federally funded. Therefore, the Union's statements do not fall under the defamation per se classification." *Lowe* at 721. The court then went on to find that the statements could be interpreted as defamatory if the reader were aware of the labor relations context in which the statements were published: "Certainly if one knew, as FAMCO's Brei did, that the federally funded Ballashire Hall project required *Lowe*, by law, to pay prevailing wages and benefits, the Union's statements would be harmful to Lowe's reputation." *Id.* at 722. The *Lowe* court could not have made it more evident that it deemed context highly relevant to the defamatory meaning issue, just as the Ninth Circuit did in the instant case. Surprisingly, what is missing from the *Lowe* court's defamatory meaning analysis is the one factor that

Steam Press heretofore insisted is the only one that matters: The statements' susceptibility to being proven true of false. Given that the *Lowe* decision advocates a consideration of context to determine defamatory meaning, how does it "conflict" with *Hawaii Teamsters* on that point? And since it does not include a discussion of the verifiability component of the defamatory meaning analysis, how does it support Steam Press's central thesis? The answer to both questions is simply that it does not.

The remaining "conflict" arguments advanced by Steam Press in the final pages of its petition are so off the mark legally and so devoid of support in the record that they seem to have been made in connection with another case entirely. Many of the cases cited therein do not even involve defamation questions. None of them suggests that the Ninth Circuit's opinion raises important federal questions, involves the interpretation of federal statute or creates a conflict with another circuit or state supreme court.

Steam Press's argument that the Ninth Circuit's opinion creates an "absolute privilege" for defamation in the labor arena has been addressed repeatedly, *supra*. No purpose would be served by refuting that argument again here.

Certainly, in the universe of federal labor law, there are questions suitable for Supreme Court resolution. But the instant *defamation* opinion—which does not hinge on any federal law except the first amendment of the United States Constitution—does not give rise to any of them

CONCLUSION

For all of the foregoing reasons, Hawaii Teamsters & Allied Workers Union Local, 996 and Mel Kahele respectfully submit that the instant petition be denied.

Respectfully submitted,

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